

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 90 of 1990

Date of Decision : 15/2/1996.

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

=====

1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

Heirs of deceased Magan Karsan

1. Kadva Magan
- 2.Ranchhod Magan
- 3.Ghogha Magan.
- 4.Lalji Magan
5. Talsi Magan
- 6.Teja Magan
- 7.Kesharben Magan.....Appellants

versus

1. Lalji Jeram
 2. Parshottam Popatlal
 3. Heirs of Ambaji Kadva
 - (1) Jeram Ambaji
 - (2) Maniben Ambaji
 - 4.Khoda Khimji
 - 5.Jepal Kanakbhai
 - 6.Dhirajlal Bhagwanji.....Respondents
-

Mr. S.M.Shah, Advocate for the Appellants.
Mr.J.R.Nanavati, Advocate for respondent No.1.
Mr. D.U.Shah, Advocate for respondents Nos.5 and 6.

CORAM : MR.JUSTICE K.R.VYAS
Date of decision: 15/02/96

ORAL JUDGEMENT

The appellants as well as respondents Nos.3 and 4 are the judgment-debtors while respondents Nos.1 and 2 are the judgment-creditors and respondent No.5 is the purchaser of the property in execution proceedings.

The learned Civil Judge (S.D.), Rajkot, passed a decree for an amount of Rs.17,000/- in Special Civil Suit No. 29/67 in favour of respondent No.1 and in the appeal being First Appeal No.1174/68 decided on 25-4-74, this Court passed a decree for specific enforcement of lands and, in the alternative, for damages of Rs.87,880/- plus Rs.15,000/- as earnest money and Rs.17,000/- for sale consideration with interest at the rate of 6% on the total amount of Rs.32,000/- from the date of the suit till realisation.

Respondents Nos.1 and 2 have, therefore, filed execution proceedings on 28-11-1975 against the appellants and respondents Nos.3 and 4 being Special Darkhast Application No.41/75 in the Court of learned Civil Judge (S.D.), Rajkot.

It is indeed a sorry state of affairs that the execution proceedings initiated in the year 1975 have still not ended even after a period of 21 years and have been dragged for one reason or the other. Obviously, the judgment-debtors are interested in seeing that the said proceedings are delayed and to achieve the object, objections have been filed at each stage of the proceedings.

It appears that the auction of the property in question was held by public auction on 16-12-1989, wherein respondent No.5 purchased the property. On the same day, the appellants filed objections vide application, Ex.204. The learned trial Judge, on the same day, rejected the said application by observing that the auction has already completed, and hence, the application would not survive. On 29-12-1989, the

appellants filed another application, Ex.211, raising practically the same grounds which were raised in the earlier application, Ex.204, challenging the auction and praying for a relief not to issue the sale certificate to respondent No.5. The learned 2nd Joint Civil Judge (S.D.), Rajkot, on 19-2-1990 rejected the said application against which the present Appeal From Order is filed. This Court admitted the appeal on 13-6-90 and an order not to confirm the sale was passed.

Mr. S.M.Shah, learned Advocate for the appellants, has submitted that under Order 21, Rule 68 of the Civil Procedure Code, no sale, without the consent in writing of the judgment-debtor, shall take place until after the expiration of at least fifteen days in the case of immovable property, and of at least seven days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale. In the submission of Mr. Shah the trial Court drawn and signed the sale proclamation on 20-11-1988, which was affixed on the Court-house on 1-12-1989 and the auction was held on 16-12-1989 and, therefore, the auction took place before the expiration of 15 days from the date of affixing a copy of the proclamation on the Court-House. Mr. Shah submitted that according to section 9 of the General Clauses Act, 1897 if the first and the fifteenth days are excluded, in that event, a clear period of 15 days is not made available and that amounts to non-compliance of the provisions of Order 21, Rule 68 of the CPC and the resultant effect of which is the vitiation of the entire sale on the ground of procedural defect. In support of this contention, he relied on the decision of this Court in Rajibhai T.Choitani vs State of Gujarat and ors 1990 (2) G.L.H.230 as also the decision of the Supreme Court in T.C.Basappav vs T.Nagappa and another AIR 1954 SC 440.

Mr.J.R.Nanavati and Mr. D.U.Shah, learned Advocates appearing for the contesting respondents have supported the order passed by the trial Court.

Having seen the relevant provisions of law, I am of the opinion that the contention raised by Mr. S.M. Shah is too technical as it is a case of mere irregularity. Even assuming for the sake of argument that there is a breach of the provisions of Order 21 Rule 68 of the CPC on the part of the trial Court inasmuch as 15 days' clear notice was not given and there is a short fall of one day only since that is merely an irregularity, the Court has all powers to reject the objection regarding procedural defect, unless a case is

made out by the judgment-debtor that because of such an irregularity or a procedural defect he has suffered substantial injury or such a decision has necessarily caused prejudice to his case. Order 21, Rule 90 (2) of the CPC provides that no sale shall be set aside on the ground of irregularity, or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. Mr. S.M.Shah submitted that the question of substantial injury can be proved at a later stage and till the issue as regards substantial injury being caused on account of such an irregularity is proved by the judgment-debtor, the Court is not entitled to apply Order 21, Rule 90. I am not in agreement with this submission of Mr. Shah. In the instant case, the appellants had not raised the contention regarding the breach of Order 21, Rule 68 of the CPC in the first instance or even in the memo of this appeal. The said contention was not raised before the trial Court even though their first application Ex.204 was rejected by it on 16-12-1989. They have not challenged the said order by filing an appeal and, on the contrary, practically on the same grounds they filed the present application, Ex.211 out of which this appeal arises. Even in this application, Ex.211, there is not even a whisper about the causing of substantial injury. As can be seen from the original papers of the proceedings, the property in question was sold to one Harilal for a consideration of Rs.55,000/- in the earlier auction held on 19-8-89. Said Hiralal ultimately requested the Court to return the amount deposited by him as the said gentleman was obviously fed up by the strike of the lawyers and ultimately lost interest in the property in question. In any case, the Court permitted him to withdraw the said amount

by its order dated 21-10-1989. It is not in dispute that this very property has been purchased under the present auction sale on 16-12-1989, four months after the first auction, wherein respondent No.5 purchased it for a consideration of Rs.2 lacs. In view of this, the property in question has in fact fetched more price and, in any case, there cannot be any substantial injury alleged to have been sustained by the appellants. The appellants were in fact present at the auction. In view of this, I see no justifiable reason to accept the submission of Mr. Shah. The decision of this Court in Rajibhai Choitani's case (supra) on which reliance is placed by Mr. Shah is a case wherein the question arose was regarding the effect of procedural breach affecting

the liberty of an individual . because of the delay of a single day vitiating the order of detention. Similarly the reliance placed on the decision of the Supreme Court in T.C.Basappa's case (supra) is also of no help to the appellants inasmuch as it was a case under the Representation of the People Act, 1951. There also different considerations may arise in an election dispute when there is a delay of even a single day. Therefore, both the decisions on which reliance is placed are of no help to the cause represented on behalf of the appellants in this case.

Since this was the only contention advanced, and

there being no merits in the same, the appeal fails and is dismissed with costs.

The ad-interim relief granted in Civil Application stands vacated. The trial Court is directed to proceed further with the execution proceedings pending before it forthwith.

_____ooo_____

TRUE COPY